

[Cite as *State v. Johnson*, 2018-Ohio-175.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 105729

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**LLOYD JOHNSON**

DEFENDANT-APPELLANT

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**JUDGMENT:  
AFFIRMED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-05-468565-B

**BEFORE:** Stewart, J., E.T. Gallagher, P.J., and Blackmon, J.

**RELEASED AND JOURNALIZED:** January 18, 2018

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MELODY J. STEWART, J.:

{¶1} In 2006, a jury found defendant-appellant Lloyd Johnson and his codefendant, Marcus Wilkins, guilty of aggravated murder on testimony by three eyewitnesses, all of whom knew Johnson. We affirmed Johnson’s conviction on appeal over his argument that his conviction was against the manifest weight of the evidence because alibi testimony given by him and his girlfriend was more persuasive than the eyewitness identifications. *See State v. Johnson*, 8th Dist. Cuyahoga No. 88372, 2007-Ohio-2501. In 2017, Johnson sought leave to file a motion for a new trial on grounds of newly discovered evidence — he offered an affidavit by codefendant Wilkins, who swore that Johnson was not present at the scene of the shooting. The court denied leave, finding that Wilkins’s affidavit, filed “eleven years later, with now contradictory information is insufficient” to provide clear and convincing evidence to support consideration of a motion for a new trial. Johnson’s sole assignment of error contests this ruling.

{¶2} A new trial may be granted when “new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at the trial.” Crim.R. 33(A)(6). A motion for a new trial on account of newly discovered evidence must be filed within 120 days after the day on which the verdict was rendered, unless the defendant shows by clear and convincing evidence that the defendant “was unavoidably prevented from the discovery of the evidence upon which he must

rely[.]” Crim.R. 33(B). If the motion for a new trial is beyond the 120-day deadline, the defendant must first seek leave to file the motion and explain why the defendant was unavoidably prevented from filing the motion at an earlier date. *Id.*

{¶3} “[A] party is unavoidably prevented from filing a motion for new trial if the party had no knowledge of the existence of the ground supporting the motion for new trial and could not have learned of the existence of that ground within the time prescribed for filing the motion for new trial in the exercise of reasonable diligence.” *State v. Walden*, 19 Ohio App.3d 141, 145-146, 483 N.E.2d 859 (10th Dist.1984). If the trial court finds that the documents submitted in support of a motion for leave clearly and convincingly demonstrate that the petitioner was unavoidably prevented from discovering the evidence, then the court must grant the motion for leave to file a motion for new trial. *State v. Glover*, 2016-Ohio-2833, 64 N.E.3d 442, ¶ 28 (8th Dist.). We review a decision denying leave to file a delayed motion for new trial for an abuse of discretion. *State v. Sutton*, 2016-Ohio-7612, 73 N.E.3d 981, ¶ 13 (8th Dist.).

{¶4} The evidence at trial established that Wilkins, who is Johnson’s cousin, was bested in a fistfight with another male. The male walked away and joined two men, one of whom was the victim. A bloody and agitated Wilkins made general threats to them and claimed that he would get the “last laugh.” Both Johnson and Wilkins left, but returned within the hour in Johnson’s van. Johnson jumped out of the van and approached the victim, claiming that the victim had attacked Wilkins. Wilkins then exited the van and approached Johnson and the victim. Wilkins had a gun, and Johnson

ordered him to shoot the victim. Wilkins apparently hesitated, causing Johnson to demand that Wilkins hand him the gun so that he could shoot the victim. This started another altercation that lasted for about 20 minutes, ending with the victim on his knees pleading for his life. Wilkins shot the victim, and he and Johnson started to flee. The victim managed to take a few steps, but seeing this, Johnson and Wilkins returned and shot him two more times. Three different eyewitnesses to the shooting testified that they knew both Johnson and the victim. Johnson and Wilkins fled to other states after the shooting.

{¶5} In his motion for leave to file a motion for a new trial, Johnson appended an affidavit from Wilkins. That affidavit states in its entirety:

I, Marcus Wilkins swear that I voluntarily provided this statement to Tom Pavlish [the notary public]. I did not see Lloyd Johnson with a gun. Lloyd Johnson had no knowledge that [the victim] and I had gotten into it.

Lloyd Johnson dropped me off at 128th and Woodside. A female was waiting on him. She followed him to the house and I never seen him again that night.

{¶6} The affidavit does not establish unavoidable delay in discovering the evidence. Johnson argues that he could only now bring the motion because Wilkins had a “change of heart” that “did not occur until recently.” Those words do not appear in the affidavit nor can they be inferred. The lack of any reason justifying the delay shows that the court did not act arbitrarily by denying leave to file the motion for a new trial. *State v. Clement*, 8th Dist. Cuyahoga No. 97930, 2012-Ohio-3818, ¶ 5 (motion for leave to file a motion for a new trial failed to offer proof of any kind to show why defendant had been

unavoidably prevented from obtaining affidavit that allegedly constituted new evidence); *State v. Bialec*, 8th Dist. Cuyahoga No. 86564, 2006-Ohio-1585, ¶ 10 (Corrigan, J., concurring); *State v. Ambartsoumov*, 10th Dist. Franklin Nos. 12AP-878 and 12AP-877, 2013-Ohio-3011, ¶ 13.

{¶7} The failure to establish unavoidable delay means that the court could not consider the merits of the motion for a new trial. *State v. Barrow*, 8th Dist. Cuyahoga No. 103331, 2016-Ohio-2839, ¶ 4, citing *State v. Brown*, 8th Dist. Cuyahoga No. 95253, 2011-Ohio-1080, ¶ 12-14. We therefore have no basis to consider the merits of the alleged newly discovered evidence. The assigned error is overruled.

{¶8} Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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MELODY J. STEWART, JUDGE

EILEEN T. GALLAGHER, P.J., and  
PATRICIA ANN BLACKMON, J., CONCUR